

VO (Migration) [2018] AATA 1559 (11 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division
REVIEW APPLICANT: Ms Thi Kim Loan Vo
VISA APPLICANT: Mrs Thi Thuy Trang Mai
CASE NUMBER: 1701036
DIBP REFERENCE(S): OSF2013/107101
MEMBER: Helena Claringbold
DATE: 11 April 2018
PLACE OF DECISION: Sydney

1. **DECISION:** The Tribunal affirms the decision not to grant the visa applicant a Contributory Parent (Migrant) (Class CA) Subclass 143 visa.

Statement made on 11 April 2018 at 12:59pm

CATCHWORDS

Migration – Contributory Parent (Class CA) visa – Subclass 143 (Migrant) – Failed to meet “Balance of family test” – Visa applicant not in a genuine relationship with review applicant’s father – Inconsistent evidence – Credibility concerns

LEGISLATION

Migration Act 1958, s. 5F(2)(a)

Migration Regulations 1994, Schedule 2, cl. 143.213, r.1.15A(3), r.1.05

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. On 4 September 2014, Mrs Thi Thuy Trang Mai, the visa applicant applied for a Contributory Parent (Migrant) (Class CA) Subclass 143 visa. The application was made on the basis of her relationship with Miss Thi Kim Ngan Huynh, her claimed step-daughter, who is the sponsor and review applicant. As Miss Huynh was under 18 years old at the time of application, therefore her mother Ms Thi Kim Loan Vo is acting as the review applicant on Miss Huynh's, behalf.
3. On 5 December 2016, a delegate of the Minister for Immigration refused to grant the visa. The refusal was based on the visa applicant not meeting cl.143.213 of Schedule 2 of the *Migration Act 1958* (the Act). The delegate was not satisfied that Mrs Mai was in a genuine and continuing spousal relationship with Mr Thong Huynh, Miss Huynh's biological father and therefore Mrs Mai did not meet the 'Balance of Family Test'. This is a review of the delegate's decision.
4. On 20 March 2018, the review applicant appeared before the Tribunal to give evidence and present arguments. She provided the Tribunal with a copy of the delegate's decision record. The Tribunal also received oral evidence from Ms Vo, Mrs Mai, Mr Huynh and Miss Huynh. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The review applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
6. The parties provided inconsistent evidence to the Tribunal. They appeared to fabricate information to allay their inability to provide agreed statements. This led the Tribunal not to be satisfied that the parties are credible.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The Tribunal has taken into consideration all the evidence in the Department of Immigration and Border Protection's file and the Tribunal file and the oral evidence at the Tribunal hearing.

8. ISSUE

9. The issue in the present case is whether the visa applicant can satisfy the 'Balance of Family Test'.

10. BACKGROUND ON THE EVIDENCE

11. Mrs Mai, the visa applicant, was born in 1989 in Vietnam. Mrs Mai declared that she and Mr Huynh married in 2008. Mrs Mai and Mr Huynh provided inconsistent information about them separating since in 2011 and reconciling in July 2013. Mrs Mai is claiming to be the current spouse of Mr Huynh.
12. Mr Huynh, the visa applicant's claimed spouse, was granted a contributory parent visa in May 2013. He lives in Australia. As recorded in the delegate's decision record, during the process of Mr Huynh's contributory parent visa Mr Huynh didn't declare any separation from Mrs Mai. However, as detailed above the parties provided inconsistent information about their relationship. Mr Huynh was previously married to Ms Vo.

13. Miss Huynh, is the biological daughter of Ms Vo and Mr Huynh. She is claimed to be the step-daughter of the visa applicant. Miss Huynh is the sponsor in this matter. However as she was under 18 at the time of application, Ms Vo is acting on her behalf.
14. Mrs Mai does not have any biological children. Therefore, the only child to be considered against the Balance of Family Test is the visa applicant's claimed step-daughter Miss Huynh. To enable Miss Huynh to be recognised as the visa applicant's step-daughter, the Tribunal must be satisfied that Mrs Mai and Mr Huynh were in a genuine spousal relationship, at the time of application.

Are the parties validly married?

15. At the time the visa application was made the visa applicant provided evidence of her marriage to Mr Huynh. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

16. Are the parties in a spousal relationship?

17. Prior to the Tribunal hearing the review applicant was advised that the Tribunal would be taking evidence about the claimed spousal relationship between Mrs Mai and Mr Huynh.
18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard may be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3) of the Migration Regulations 1994 (the Regulations), which is extracted in the attachment to this decision.
19. On these aspects the Tribunal has considered the evidence before it and is satisfied the facts of this case are as follows.

20. CLAIMS AND FINDINGS

21. The parties do not have any joint ownership of real estate or other major assets; or any joint liabilities and have not pooled their financial resources and do not have any major financial commitments. The parties do not owe any legal obligation in respect of the other. Mr Huynh claims to have supported Mrs Mai financially. Mr Van Tu Tran on 12 December 2015 stated that he delivered several thousand dollars to Mrs Mai from Mr Huynh. One copy of a money transaction has been provided stating that in October 2016, Mr Huynh sent \$9,000 to Mrs Mai. The parties provided inconsistent information about household expenses and this is discussed below.
22. The parties do not have any joint responsibility for the care and support of children. The Tribunal has been provided with four translated documents named retail invoices. The translated copies tell the Tribunal that the invoices record 'room for renting' and have Mr Huynh and Mrs Mai's names on them. Three of the invoices are undated and one invoice is dated 14 February 2018. The Tribunal has also been provided a household registration for temporary stay dated 27 February 2018 until 9 February 2018 at the home of his mother. Mr Huynh has lived in Australia since 2013 and Mrs Mai has lived in Vietnam. The parties claim to have separated in 2011 and to have reconciled in 2013. They claim to have lived together when Mr Huynh returned to Vietnam. The parties provided inconsistent evidence about their

relationship and about them living together to the Department and to the Tribunal and this is discussed below.

23. The parties claim to represent themselves to other people as being in a spousal relationship. Other than Mr Tran stating that he delivered money to Mrs Mai, there are no other third party statements. The applicant provided photographs of herself with Mr Huynh and others at different locations. The photographs are dated 2007, 2013, 2014, 2016, 2017 and 2018. The parties provided inconsistent evidence about their social activities and this is discussed below.
24. Since his arrival in Australia in 2013, Mr Huynh has travelled to Vietnam in 2013 for 19 days, in 2014, for 22 days, in 2016, for 25 days, in 2017, for approximately one month and eighteen days and in 2018 for 19 days. The parties' provided inconsistent evidence about their relationship and this is discussed below. This led the Tribunal to question the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long term one.
25. The Tribunal discussed information detailed in the delegate's decision record with Ms Vo, Mrs Mai and Mr Huynh. This informs the Tribunal that on 21 September 2015 in a telephone interview with the Department, Mrs Mai was unable to provide the date of her wedding date to Mr Huynh, was unaware that she and Mr Huynh had separated in 2011 and stated that their relationship had never broken down.
26. Other information discussed with them and recorded in the delegate's decision record is that, on 23 September 2015, in a face to face interview and in contrast to her evidence of 21 September 2015, Mrs Mai stated that she and Mr Huynh had separated in 2011 and she did not provide any information about the parties' reconciliation. She stated that she and Mr Huynh had limited contact since 2011 and had not remained in contact after he migrated to Australia which was in May 2013. She had little knowledge of Mr Huynh's life, his family, his household, his employment, where he lived and social life. She said that she lived with her mother and not Mr Huynh, but she had lived with him in the past. Other than Miss Huynh's name and date of birth, she was unable to provide any information about Miss Huynh. When asked why Miss Huynh was sponsoring her she stated that Mr Huynh had asked his daughter to help. Also detailed in the delegate's decision record is the parties' claim that the inconsistent information given by Mrs Mai was due to her father's death, her mother being unwell and Mrs Mai also being unwell.
27. Ms Vo told the Tribunal that she didn't know about Mrs Mai and Mr Huynh's relationship, other than they married. She told the Tribunal that she would be unable to provide information about their relationship. She said that Miss Huynh found her father depressed, because of the situation with his wife and wanted to sponsor her to come to Australia. Miss Huynh asked Ms Vo to help and she agreed.
28. The Tribunal put information to Ms Vo under the relevant provision. Ms Vo requested and was granted additional time to respond. On 1 April 2018, Ms Vo instructed the Tribunal that Mr Huynh's submission to the Tribunal dated 23 March 2018 is to be taken as her response to this information.
29. Mrs Mai provided evidence to the Department in September 2015 that the parties had separated in 2011 and had limited contact since that time. She stated that the parties had not remained in contact after Mr Huynh migrated to Australia in May 2013. This evidence was put to Ms Vo because it was inconsistent with Mr Huynh's evidence to the Tribunal that, he and Mrs Mai had not separated in 2011. He claimed that the information that they had separated was an error made by the migration agent. Contrary to the evidence he gave to the Tribunal, in a statutory declaration dated 2013 and signed by Mr Huynh, he stated: 'My

marriage to my wife became unstable at the beginning of the year 2011 and we separated at that point in time’.

30. This matter was not responded to. The Tribunal is not satisfied that the parties are credible. They provided inconsistent information about their separation. Mrs Mai provided two different versions to the Department about them not being separated and then about them being separated. While Mr Huynh initially stated the parties had separated in 2011 and then told the Tribunal the parties had not separated. The Tribunal does not accept that the visa applicant’s father’s death, her mother’s illness and her own anxiety would prevent Mrs Mai providing consistent evidence. Neither, does it accept that the inconsistent information was a result of the migration agent, because Mrs Mai gave the inconsistent information, herself, to the Department. Likewise, Mr Huynh gave one version of the parties’ separation in his signed statement and another version to the Tribunal. The Tribunal is of the view that Mrs Mai and Mr Huynh are fabricating evidence to alleviate inconsistencies in their evidence.
31. Mrs Mai provided evidence to the Tribunal that Mr Huynh has one bank account in Australia. She said he has a car but he didn’t have any other financial assets. This evidence was put to Ms Vo because it was inconsistent with Mr Huynh’s evidence to the Tribunal that, he has two bank accounts in Australia and owns 5,000 square metres of land in Vietnam for building houses and this is valued at 2 billion VND.
32. Mr Huynh responded and stated that he did not tell Mrs Mai about one of his bank accounts. He stated this is because he saves money into another bank account for his daughter and intends to use it for his daughter when she needs it. While the Tribunal may accept this to be the case, it does not accept that this is indicative of a couple who provide each other with support. It also does not explain Mrs Mai’s lack knowledge about the land owned by Mr Huynh. The Tribunal is not satisfied that the parties share day-to-day matters.
33. Mrs Mai provided evidence to the Tribunal that she has a bank account in Vietnam with a balance of 10 million VND. She said that she did not own any land or property and did not have any other financial assets. This evidence was put to Ms Vo because it was inconsistent with Mr Huynh’s evidence to the Tribunal that Mrs Mai does not have a bank account in Vietnam and she keeps her money at home. He stated that she also owns land and the house where her mother lives.
34. Mr Huynh responded and stated that Mrs Mai recently opened a bank account without his knowledge and has saved the money he sent her. He stated that she wants to use the money to help him pay for the second visa application charge or to help in difficult times when she comes to Australia. Even if the Tribunal accepted this explanation, it does not accept the inconsistent evidence provided by Mr Huynh that Mrs Mai owned land and property in Vietnam because Mrs Mai told the Tribunal that she does not own any land or property.
35. Mrs Mai provided evidence to the Tribunal that when Mr Huynh is in Vietnam the parties’ live with Mr Huynh’s parents and his younger brother. She stated that she does the cooking and cleaning. She initially said that she and Mr Huynh take care of the household expenses. However she changed her statement and said that she pays for the electricity, water and food. This evidence was put to Ms Vo as it was inconsistent with Mr Huynh’s evidence that his younger brother does the household duties including the cooking and cleaning. However, he contributes to the household by giving his parents money.
36. This matter was not responded to. The Tribunal is of the view that the parties should be able to provide consistent information about who does the household chores when they live together in Vietnam.

37. Mrs Mai provided evidence to the Tribunal that Mr Huynh returned to Vietnam in 2017 for one month and again on another visit for one week. She said that the parties went to Ho Chi Minh City and maybe stayed overnight. She stated that on 16 February 2018, there was a party on at Mr Huynh's parent's home to celebrate the Lunar New Year. She told the Tribunal that the siblings attended the party. This evidence was put to Ms Vo as it was inconsistent with Mr Huynh's evidence that in 2017 he was in Vietnam for a month and on another visit he stayed in Vietnam for 19 days.
38. Mr Huynh responded and stated that during his second trip to Vietnam in 2017 he lived with Mrs Mai for one week. However, after a week, he became suspicious of Mrs Mai, because there was 'something not right about our sexual relationship'. He stated that he told Mrs Mai that he had to depart for Australia. But remained in Vietnam for three weeks and 'spied on her making sure that she had no other men whilst I was gone (back to Australia)'. Mr Huynh did not reveal the outcome of his spying activity; however, the Tribunal is not satisfied by this information that, the parties provide each other with support and companionship.
39. Mrs Mai provided evidence to the Tribunal that when she comes to Australia the parties will need somewhere to live. She said she would help Mr Huynh with his job, have children and a stable life. This evidence was put to Ms Vo as it was inconsistent with Mr Huynh's evidence that the parties would live together and find employment.
40. This matter was not responded to. The Tribunal is not satisfied that the parties are committed to each other, particularly when Mr Huynh failed to mention, what would be a major event in their relationship, such as them having children together.
41. Mrs Mai provided evidence to the Tribunal that in the week prior to the Tribunal hearing Mr Huynh worked on Monday, Thursday and Saturday from 9am to 10pm and in the week of the hearing didn't work at all. This evidence was put to Ms Vo, as it was inconsistent with Mr Huynh's evidence that in the week prior to the Tribunal hearing he worked Monday and Wednesday, 9am to 8 or 9pm and in the week of the Tribunal hearing he worked on the Monday.
42. Mr Huynh responded and stated that his work is unstable and he does not have a fixed work schedule. He stated that he answered honestly about his work and the visa applicant answered honestly to the best of her knowledge. The Tribunal considers it reasonable to expect parties in a genuine relationship to have knowledge of their day-to-day circumstances.

43. Other Considerations

44. At the Tribunal hearing the Tribunal inadvertently referred to the Mrs Mai interview of 21 September 2015 with the Department as having taken place in May 2015. Ultimately, the relevant information from the interview is the inconsistency in evidence Mrs Mai provided during the interview of 21 September 2015 and the face to face interview of 23 September 2015.
45. The Tribunal accepts the evidence that the Mrs Mai and Mr Huynh married. It accepts that the parties lived together for a time and shared some social interaction. However, having considered the evidence individually and as a whole, the Tribunal is not satisfied that the Mrs Mai and Mr Huynh were in a spousal relationship. The parties claimed to be spousal partners for approximately 10 years, yet during the hearing Mrs Mai and Mr Huynh provided inconsistent evidence to the Tribunal about their relationship. They gave evidence that they had separated and then denied this evidence by stating that they had not separated. They lacked knowledge about their individual financial circumstances and about who took care of household duties and who financially supported the household in Vietnam. Other inconsistencies related to Mrs Mai employment and the length of time Mr Huynh was in

Vietnam. The inconsistencies in the parties' accounts of these matters cast significant doubt over the reliability and credibility of the parties' oral evidence before the Tribunal.

46. In view of all the above, the Tribunal is not satisfied by the parties' evidence provided to the Tribunal, or that they demonstrate a sound knowledge of each other's lives which is commensurate with a couple in a genuine and ongoing spousal relationship. In respect of whether there is a mutual commitment to a shared life as spousal partners to the exclusion of all others the Tribunal does not accept the parties' evidence.
47. The Tribunal has considered all aspects of the parties' relationship including the financial and social aspects, the nature of the household and the parties' commitment to each other. It has considered the evidence individually and as a whole. The Tribunal finds that the parties know each other personally, have lived together, have socialised in Vietnam and have communicated with each other. However, the Tribunal is not satisfied that the parties were in a genuine spousal relationship at the time of application and at the time of this decision.
48. The Tribunal considered all the evidence individually and as a whole including the Department and Tribunal files and the evidence pre-and post-hearing and at the Tribunal hearing. Given the inconsistent evidence and credibility concerns, the Tribunal, is not prepared to accept the parties' evidence about their commitment to the relationship. The parties have not satisfied the Tribunal that the parties have a mutual commitment to a shared life to the exclusion of all others or that they have a genuine and continuing relationship either at the time of application or the time of this decision. The Tribunal is not satisfied that Mrs Mai is the spousal partner of Mr Huynh.

Is the 'balance of family test' satisfied?

49. With a limited exception not applicable in the present case, cl.142.213 to the Regulations requires at the time of the application the applicant must satisfy the 'Balance of Family Test', as defined in r.1.05.
50. Broadly speaking, an applicant will satisfy the 'Balance of Family Test' if the number of his or her children lawfully and permanently resident (or eligible New Zealand citizens usually resident) in Australia is either: greater than or equal to the total number of children who are resident overseas or greater than the greatest number of children who are resident in any single overseas country: r.1.05(2).
51. 'Children' for these purposes include all natural, adopted and step-children of the parent or the parent's current spouse or current de-facto partner.
52. The Tribunal is not satisfied that Mrs Mai and Mr Huynh are in a genuine and continuing spousal relationship. Miss Huynh therefore is not considered to be Mrs Mai's step-daughter and cannot be considered against the 'Balance of Family Test' and there are no other children to be considered in the test. As a result, Mrs Mai does not satisfy the 'Balance of Family Test' and does not meet cl.143.213 of the Regulations.
53. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

54. The Tribunal affirms the decision not to grant the visa applicant a Contributory Parent (Migrant) (Class CA) Subclass 143 visa.

Helena Claringbold
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).